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IN THE

Supreme Court of the United States

October Term, 1995

EARL JAMES FIELDS,
BEN ARTHUR TURNER, SR.,
BERNIE MAE KENDRICK FANN,

Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Oregon v. Kennedy*, this Court held that the Double Jeopardy Clause of the Fifth Amendment bars retrial if a prosecutor's conduct giving rise to a defendant's successful mistrial motion was intended to goad or provoke the defendant into moving for mistrial. The questions presented by this case are:

1. Whether *Oregon v. Kennedy* precludes a lower Court from considering actions of the prosecutor other than the specific misconduct immediately giving rise to a successful mistrial motion as evidence of the prosecutor's intent.

2. Whether the opinion of the Court of Appeals, which sanctioned the District Court's express refusal to consider such evidence in this case, conflicts with *Oregon v. Kennedy* or departs from the accepted and usual course of judicial proceedings.

3. Whether the prosecutor's deliberate introduction of false evidence, when considered with all of the objective facts and circumstances of this case, requires dismissal under the Double Jeopardy Clause.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Earl James Fields, Ben Arthur Turner, Sr., and Bernie Mae Kendrick Fann respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals [App. A, *infra*, 1a-2a] is unpublished; the affirmance is reported by table reference at 72 F.3d 887. The order of the Court of Appeals denying rehearing and rehearing en banc without opinion [App. D, *infra*, 10a-11a] is not reported. The orders of the District Court [Apps. B-C, *infra*, 3a-9a] are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 29, 1995 [App. A, *infra*, 1a]. The Court of Appeals denied rehearing and rehearing en banc on February 9, 1996 [App. D, *infra*, 10a-11a].[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2106.

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[1]Per 11th Cir. R. 35-6, the Joint Suggestion of Appellants Fields, Turner and Fann for Rehearing En Banc was also treated as a petition for rehearing. *See* Sup. Ct. R. 13.3.

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb ....

STATEMENT OF THE CASE

The Petitioners were indicted on charges of conspiracy under 21 U.S.C. § 846 and 18 U.S.C. §§ 371 and 1503, obstruction of justice, and perjury under 18 U.S.C. § 1623. After extensive pretrial hearings, the case proceeded to jury trial. At the conclusion of the first week of trial, the District Court granted defense motions for mistrial after the Government's case agent testified on redirect examination that Petitioner Fields could have used the Florida Lottery to launder illegal drug proceeds, then admitted on recross examination that the Government had no witnesses to back up the Government's money laundering theory.[2]

Thereafter the Petitioners filed motions to dismiss and bar retrial under the Double Jeopardy Clause of the Fifth

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[2]The case agent's testimony that directly lead to the defense request for mistrial is recounted in Appendix D, *infra*, 12a-15a; *see also* R37-450-125-127 ("37" references the volume, "450" the document number and "125-127" the document pages of the original record in the Court of Appeals).

Amendment. The Petitioners proffered an extensive factual basis and requested an evidentiary hearing to demonstrate that the prosecutor intended to provoke the Petitioners into moving for mistrial [R9-446, 454, 457].

With regard to the specific act that precipitated the mistrial, the Petitioners submitted facts that the prosecutor knew when he questioned his case agent that the Government had no evidentiary foundation for the money laundering theory and that this evidence was false [R9-446-20-23].

The motions to dismiss also presented facts that the prosecutor's money-laundering hypothetical was not an isolated instance of misconduct, but part of a sequence of overreaching that corroborated his intent to provoke mistrial. The motions outlined other occasions when the prosecutor had not corrected misleading evidence and through leading questions, introduced false evidence [R9-446-17-20]. The motions identified inappropriate conduct by the prosecutor during an overnight recess that intimidated a key Government witness whose trial testimony had not been favorable for the Government [R9-446-6-16]. The record contains repeated admonishments of the prosecutor by the trial Judge for this and other improper conduct [R9-446-7-9, 12, 15].

Finally, the motions presented the following facts to demonstrate the prosecutor's motive in provoking mistrial: First, that the prosecutor intentionally elicited the money laundering testimony from his case agent in response to significant defense inroads to the charged crimes achieved by defense counsel on cross-examination of that witness [R9-446-19, 20]; and second, post-trial evidence that the Government, days after of the mistrial, had interviewed and

subpoenaed for retrial additional witnesses to bolster a particularly weak aspect of the Government's drug conspiracy theory [R9-446-25, 26]. This was corroborated on the eve of retrial when the Government filed a supplement to its witness list identifying the new witnesses [R9-464].

The prosecutor filed an unsworn response that argued that the defense had presented "no plausible reason why the prosecution would want a mistrial ..." [R9-451-11]. The Government's pleading urged that the District Court consider only the money laundering examination that directly lead to the defense's request for mistrial, arguing "almost everything in the trial which occurred before Detective Zipperer's testimony can safely be ignored." [R9-451-2]. The prosecutor confirmed that he had recently learned of the two additional witnesses but stated that he "had no knowledge of these witnesses, the efforts to find them, or anything about them, until well after the mistrial was declared" [R9-451-15].

The District Court[3] denied the motions to dismiss without hearing, holding that review of the record "does not evince an intent by the prosecutor to deliberately cause a mistrial" [App. B, *infra*, 6a]. The District Court expressly declined to consider any of the facts proffered by the Petitioners' motions to dismiss other than the money-laundering examination that gave rise to the mistrial motion, concluding that those circumstances were "not germane" to the issue of whether the prosecutor intended to goad the

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[3]The District Judge who denied the motions had presided at jury selection but not at the ensuing trial.

Petitioners into moving for a mistrial [App. B, *infra*, 6a].[4]

The United States Court of Appeals for the Eleventh Circuit affirmed without oral argument. Reiterating that the District Court "found that the prosecutor did not intentionally provoke the defendants into seeking a mistrial," the Court of Appeals found "no clear error" [App. A, *infra*, 2a].

REASONS FOR GRANTING THE PETITION

This case presents an important issue regarding application of the double jeopardy test of *Oregon v. Kennedy*, 456 U.S. 667 (1982)(hereinafter *Kennedy*). Under that decision, lower tribunals should consider not only the "conduct giving rise to the successful motion for a mistrial," *id.* at 679, but also other "objective facts and circumstances" to assess prosecutorial intent. *Id.* at 675.

In this case the District Court expressly declined to consider the entire record in determining prosecutorial intent, including evidence of the prosecutor's motive and of a sequence of overreaching that culminated in a specific act that provoked mistrial. This conflicts with and departs from accepted practice under *Kennedy*. The Court of Appeals sanctioned this analysis by applying the deferential "clearly erroneous" standard of review to the District Court's findings. Moreover, the decision of the Court of Appeals

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[4]In a subsequent Order the District Court found that the Double Jeopardy issue raised by the Petitioners is not frivolous, warranting a stay of retrial pending interlocutory appeal under *Abney v. United States*, 431 U.S. 651 (1977) [App. C, *infra*, 9a].

departs from established precedent that a lower court's findings of fact do not command the deference of the clearly erroneous standard of review if they are made under an erroneous view of controlling legal principles.

Finally, the decision of the Court of Appeals offers occasion for this Court to address precisely what *Lockhart v. Nelson*, 488 U.S. 33, 34 (1988) did not -- the application of the Double Jeopardy Clause under *Kennedy* to a record that "suggests ... misconduct in the prosecutor's submission of the evidence."

I. The Decision of the Court of Appeals Conflicts with *Kennedy* on an Important Question of Federal Law.

A. The Federal Issue. In *Kennedy*, 456 U.S. 667 (1982), a majority of this Court stated that its prior decisions were of "less than crystal clarity" in "the precise phrasing" of circumstances under which the Double Jeopardy Clause bars a second prosecution after the defendant has successfully moved for mistrial. 456 U.S. at 673-74.[5] While *United States v. Dinitz*, 424 U.S. 600 (1976) limited the exception "to cases of governmental actions intended to provoke mistrial requests," other language in *Dinitz* seemed to broaden the applicable jeopardy test to more generalized prosecutorial "harassment" or "overreaching" standards.

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[5]The Court had addressed this "narrow exception to the rule that the Double Jeopardy Clause is no bar to retrial," 456 U.S. at 673, in *United States v. DiFrancesco*, 449 U.S. 117 (1980); *United States v. Dinitz*, 424 U.S. 600 (1976); *United States v. Jorn*, 400 U.S. 470 (1971); and *United States v. Tateo*, 377 U.S. 463 (1964).

Kennedy, 456 U.S. at 674, *quoting Dinitz*, 424 U.S. at 611.

Concerned that these tests lack standards for application, this Court concluded that prosecutorial overreaching alone does not trigger jeopardy under *Kennedy*. Rather, the reviewing court must consider whether a prosecutor acted with the requisite intent:

> Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause .... Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.

456 U.S. at 675-76. "[T]hough certainly not entirely free from practical difficulties," this standard would be "manageable" because "[i]nferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system." *Id.* at 676.

Kennedy concerned only a single act of misconduct. The defense moved for mistrial after the prosecutor referred to the defendant as a "crook" on redirect examination of the state's expert witness. In finding that the prosecutor did not intend to cause a mistrial, the Oregon trial court necessarily

considered the nature of that misconduct -- the prosecutor's single question -- as objective evidence of the prosecutor's intent. The Oregon appeals Court accepted that finding but found that retrial was barred because the prosecutor's question constituted overreaching. This Court, concluding that the Double Jeopardy Clause cannot be successfully invoked for "overreaching" alone, reversed because the requisite intent to provoke mistrial was found lacking by the lower courts. 456 U.S. at 669-70.

Kennedy did not limit lower courts from considering as evidence of intent prosecutorial overreaching other than the misconduct that immediately precipitates a defense motion for mistrial. Justice Powell, who joined in the majority opinion in *Kennedy*, noted this critical point in his separate concurring opinion. Subjective intent must be determined from all of "the objective facts and circumstances of the particular case," 456 U.S. at 679-80 (Powell, J., concurring). While the Oregon Court of Appeals had before it only "a single question ... constituting 'overreaching' so serious as to bar a retrial ...," Justice Powell emphasized:

> Nevertheless, this would have been a close case for me if there had been substantial factual evidence of intent beyond the [prosecutor's] question itself. Here, however ... there was no sequence of overreaching prior to the single question.

Id. at 680.

The "intent" standard under *Kennedy* provides guidance to the lower courts on how to assess facts such as the prosecutor's motive. While the prosecutor's bad faith or

harassment of the defendant does not alone suffice, *id.* at 674-75, the prosecutor's concern of acquittal or desire to increase the chance of conviction by forcing mistrial and introducing new evidence at retrial is relevant to intent to goad the defendant into seeking mistrial. Thus, the prosecutor's motive is a component of the *mens rea* inquiry, as are any other facts and circumstances in the record that shed light on the prosecutor's intent. *Id.* at 675 & n.5.

Such comprehensive analysis of the trial record is consistent with the *Kennedy* Court's focus on "'*governmental actions* intended to provoke mistrial requests.'" 456 U.S. at 674 (emphasis added), *quoting Dinitz*, 424 U.S. at 611 and "the rule of" *United States v. Tateo*, 377 U.S. 463, 468 n. 3 (1964). It also comports with the key double jeopardy policy to be protected where there has been prosecutorial misconduct causing a defendant to move for mistrial. If the prosecutor's conduct, considered as a whole, evinces the requisite intent to goad the defendant into mistrial, the defendant has lost primary control over whether he wants to continue in the same trial, subverting the essential protection afforded under the Double Jeopardy Clause of the defendant retaining primary control over completion of the case. *Kennedy*, 456 U.S. at 671-73, 675-76, 679.

Prosecutorial intent -- what the prosecutor thought and what purpose motivated the prosecutor's behavior -- is the polestar of various other constitutional inquiries. *See, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986)(discriminatory use of peremptory challenges); *United States v. Goodwin*, 457 U.S. 368 (1982)(prosecutorial vindictiveness in charging decisions). This task is, while a familiar one, is at best

difficult.[6] Discerning such subjective intent necessarily requires review of all objective facts in the record, for rarely does a prosecutor concede culpability. To attempt to glean intent from only the specific act giving rise to mistrial is to render the analysis meaningless, as it was in this case.

B. Conflict with *Kennedy*. The Respondent repeatedly and successfully argued in the District Court and the Court of Appeals that *Kennedy* precludes consideration of the extensive record evidence in this case of prosecutorial overreaching and motive other than the money laundering

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[6]Some suggest it may be impossible. *See*, *e.g.*, *Kennedy*, 456 U.S. at 688 (Stevens, J., concurring in the judgment); Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U.Pa. L. Rev. 1365, 1426 (1987)(reviewing the application of the "intent" standard in various categories of cases); James F. Ponsoldt, *When Guilt Should Be Irrelevant: Government Overreaching As A Bar to Reprosecution Under the Double Jeopardy Clause After Oregon V. Kennedy*, 69 Cornell L. Rev. 76, 100 (1983)(analyzing application of the intent standard in mistrial cases). Some courts agree that the intent standard under *Kennedy* is too rigorous. *See*, *e.g.*, *Bauder v. State*, 1995 Tex. Crim. App. LEXIS 128 (Tex. Crim. App. Dec. 6, 1995); *State v. Hoke*, 731 P.2d 1261 (Haw. 1987); *State v. White*, 354 S.E.2d 324 (N.C. Ct. App. 1987); *Pool v. Superior Court of Arizona*, 677 P.2d 261 (Ariz. 1984); *State v. Kennedy*, 666 P.2d 1316 (Or. 1983).

examination that provoked the mistrial motions.[7] The District Court was persuaded by this argument, specifically concluding that any other actions by the prosecutor were "not germane" to the double jeopardy inquiry [App. B, *infra*, 6a]. The decision of the Court of Appeals affirmed the District Court's misperception by finding no "clear error" [App. A, *infra*, 2a].

As demonstrated above, this rationale is in direct conflict with *Kennedy*. The conflict is not one of misapplication of a properly stated rule of law. Rather, the lower courts in this case have improperly defined the correct rule of law of *Kennedy*, which requires consideration of all of the facts and circumstances in the record to properly determine the prosecutor's intent. The Court should grant certiorari to maintain the integrity of its precedent in this important area of double jeopardy jurisprudence.[8]

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[7]*See* the prosecutor's response to the dismissal motions in the District Court [R9-451-1, 2, 7, 9, 13-16] and the Brief of Appellee in 11th Cir. Case No. 94-3352.

[8]Alternatively, this case conflicts with decisions of other Courts of Appeal, which uniformly consider other "facts and circumstances" in assessing prosecutorial intent. *See, e.g., United States v. Benson*, 1993 U.S. App. LEXIS 30435 (CA9 Nov. 10, 1993):

> We have previously acknowledged that three objective factors may be considered for the purpose of determining whether the intent of the government misconduct was to provoke a motion for mistrial. First, the court may

II. The Decision of the Court of Appeals Sanctions the District Court's Departure from the Accepted and Usual Course of Judicial Proceedings.

The decision of the Court of Appeals approves the District Court's departure from the accepted and usual course of judicial proceedings under *Kennedy*. Reported decisions that have applied that decision uniformly consider governmental actions that are not the immediate factual predicate to mistrial. These decisions demonstrate that objective evidence such as a continuing "sequence of overreaching," "harassment" or other bad faith conduct, while not alone sufficient to warrant jeopardy relief, must still be considered in evaluating the subjective intent of the prosecutor.[9] Such misconduct, present in the record in this

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> consider whether 'the government's case was going badly, causing the prosecutor to fear acquittal and affirmatively to seek a mistrial .... Second, consideration may be given to the 'advantages the government would gain from a second trial ....' Finally, the court may examine evidence that 'the government committed repeated acts of misconduct, which deprived defendant[] of [the] primary control over whether to request a mistrial.

Id. at 30437 (citations omitted). *See also infra* notes 9-11 and accompanying text.

[9]*See, e.g., United States v. Ivory*, 29 F.3d 1307, 1309-11 (CA8 1994); *United States v. White*, 914 F.2d 747, 752 (CA6 1990); *United States v. LaRouche Campaign*, 866 F.2d

case, cannot be clinically divorced from the *Kennedy* inquiry simply because of temporal distance from the actual declaration of mistrial.

Further, reported decisions usually evaluate available evidence of the prosecutor's motive, again present in the record below. If misconduct that goads mistrial occurs when the prosecutor fears acquittal, jeopardy may apply.[10] Retrial may also be barred if the prosecutor stands to gain a tactical advantage at retrial, such as using witnesses or evidence that were not available when the case was first tried, or otherwise improving the evidentiary presentation of the Government.[11]

512, 515-18 (CA1 1989); *United States v. Robuck*, 690 F.2d 794, 795-96 (CA10 1982).

[10]*See, e.g., United States v. Pavloyianis*, 996 F.2d 1467, 1474-75 (CA2 1993); *United States v. Jozwiak*, 954 F.2d 458, 460 (CA7 1992); *United States v. Standefer*, 948 F.2d 426, 432 (CA8 1991); *United States v. Lun*, 944 F.2d 642, 644-46 (CA9 1991); *United States v. Gonzalez*, 719 F.2d 1516, 1519 (CA11), *cert. denied*, 465 U.S. 1037 (1984); *People v. Copeland*, 492 N.Y.S.2d 853 (N.Y. Crim. Ct. 1985).

[11]*See, e.g., United States v. Cartagena-Carrasquillo*, 70 F.3d 706, 714 (CA1 1995); *Greyson v. Kellam*, 937 F.2d 1409, 1413 (CA9 1991); *United States v. Zielie*, 734 F.2d 1447, 1459-60 (CA11), *cert. denied*, 469 U.S. 1189 (1984); *United States v. Singleterry*, 683 F.2d 122, 124 (CA5 1982), *cert. denied*, 459 U.S. 1021 (1983); *Duncan v. State*, 525 So. 2d 938 (Fla. 3d DCA 1988).

This is an exceptional case of departure because the District Court expressly refused to consider *any* evidence of the prosecutor's pattern of overreaching or his motive other than the misconduct that directly preceded the declaration of mistrial. The Court should exercise its supervisory power to correct this overt disregard of the accepted and usual course of judicial proceedings under *Kennedy*.

III. The Decision of the Court of Appeals Departs from Established Precedent Regarding Application of the Clearly Erroneous Standard of Review.

In *Kennedy* the Court made clear that a lower Court's finding of intent is usually entitled to deferential review because the trial judge is "best situated intelligently to make such a decision," 456 U.S. at 677 n.7, *quoting Gori v. United States*, 367 U.S. 364, 368 (1961).

In this case, however, the trial court's findings do not command the deference of the clearly erroneous standard of review because they were made under an erroneous view of controlling legal principles.[12] *See, e.g., Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982), which reiterates established precedent that a trial court's findings may be set

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[12]Furthermore, the factfinder here was not the District Judge who tried the case, nor did the District Court conduct a hearing on the facts presented in the Petitioners' dismissal motions and the prosecutor's unsworn written response, unlike in *Kennedy*. *Id.* at 669 & n.2.

aside if they rest on an erroneous view of the law.[13]

Here, the District Court misapprehended the scope of facts it should take into consideration in assessing prosecutorial intent under *Kennedy*. That Court's finding that the prosecutor did not have the requisite intent should not have been accorded the "clearly erroneous" standard of review by the Court of Appeals, but rather *de novo* review or remand[14] to the District Court for further factfinding.

The Court of Appeals' failure to accord the proper standard of review under these circumstances was unreasonable in light of substantial precedent on the appropriate standard of review. This departure by the Court of Appeals resulted in disregard of important evidence of prosecutorial intent, including a sequence of overreaching that culminated in mistrial and evidence of the prosecutor's motive to provoke that mistrial. The application of the clearly erroneous standard of review by the Court of Appeals constitutes a substantial departure from the accepted and usual course of judicial proceedings, warranting exercise of this Court's supervisory power.

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[13]*See also Cooter and Gell v. Hartmax Corp.*, 496 U.S. 384, 402 (1990); *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 501 (1984); *Inwood Labs., Inc. v. Ives Labs, Inc.*, 456 U.S. 844, 855 n.15 (1982).

[14]*See, e.g., United States v Oseni*, 996 F.2d 186, 189 (CA7 1993); *United States v. Rolan-Tapia, et al.*, 1993 U.S.App. LEXIS 26849, 26850 (CA9 Oct. 14, 1993).

IV. All of the Objective Facts and Circumstances Demonstrate the Prosecutor's Intent to Provoke Mistrial by the Deliberate Introduction of False Evidence.

This case presents a double jeopardy inquiry left open in *Lockhart v. Nelson*, *supra*. In *Lockhart*, the Court held that the Double Jeopardy Clause does not bar retrial when an appellate court reverses the defendant's conviction because of trial error in the admission of evidence without which there is insufficient evidence to support conviction. 488 U.S. at 40-42. The evidence erroneously admitted consisted of a prior conviction used as part of the State of Arkansas' predicate to enhance the defendant's sentence. The defendant had been previously pardoned for that conviction.

This Court specifically recognized that "[n]othing in the record suggests any misconduct in the prosecutor's submission of the evidence." *Id.* at 34. The Court continued:

> There is no indication that the prosecutor knew of the pardon and was attempting to deceive the court. We therefore have no occasion to consider what the result would be if the case were otherwise. Cf. Oregon v. Kennedy, 456 US 667, 72 L Ed 2d 416, 102 S Ct 2083 (1982).

488 U.S. at 35 n. 2.

In this case, consideration of all of the objective facts and circumstances in the record, including the sequence of overreaching by the prosecutor that preceded his money laundering examination, demonstrate the prosecutor's

deliberate misconduct in introducing false evidence with the intent to force the Petitioners to seek mistrial. Prompted by a "hypothetical" question from the prosecutor [App. E, *infra*, 12a], the case agent provided testimony of alleged money laundering by Petitioner Fields that was totally uncorroborated [App. E, *infra*, 15a]. The prosecutor knew this evidence was false from testimony previously received from an FBI agent before the Federal Grand Jury [R28-383-51]. The defense also knew this from pretrial discovery and repeatedly tried to block the admission of the fraudulent evidence by the prosecutor [App. E, *infra*, 12a-13a]. The District Judge who tried the case was not aware of the grievous nature of this evidence until defense counsel demonstrated its falsity on recross examination of the case agent [App. E, *infra*, 15a]. Only then did the trial Judge recognize the gravity of the prosecutor's conduct [R37-450-160-170].[15]

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[15]The trial Court asked the prosecutor in chambers: "...[D]o you have any realistic hope that if the case goes to a jury and Mr. Fields is convicted, that you have any chance at all of hanging on to that after consideration by the Court of appeals, assuming that it got that far?" [R37-450-160-161]. The Court concluded: "... I don't know how in the world I would fashion a limiting instruction that would be anywhere near adequate to withstand scrutiny by the Court of appeals ..." [R37-450-170]. Thereafter, in open Court, the District Court terminated the trial:

> THE COURT: ... Well, I have to bite the bullet and I'm prepared to bite it .... Due to the circumstances that we're confronted with here, and having had the benefit of a

This is the type of deception referred to by the Court in *Lockhart v. Nelson*. It demonstrates an intent by the prosecutor to goad the defense into seeking mistrial, particularly when considered in the context of the entire record, which presents evidence of the prosecutor's motive.

The prosecutor posed his "hypothetical" question on the fourth day of presentation of evidence at trial. At that point, the prosecutor had engaged in a "sequence of overreaching" that had earned not only the rebuke of the trial Court, but also risked reversal if the prosecutor gained his convictions.

Further, when the prosecutor posed his "hypothetical" question, the defense had made significant inroads into the Government's case. The case agent had been effectively cross-examined about matters exculpatory to the Petitioners, including the fact that Petitioners Fields and Turner often gambled, Fields successfully, in the Florida Lottery and elsewhere [R37-450-57-59, 65-83, 121-23].

Finally, the post-trial record demonstrates that within days of the mistrial in Jacksonville, Government agents interviewed two persons in Miami who were subsequently

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> transcription of the proceedings commencing just a little bit before Mr. Mueller began his redirect of Mr. Zipperer and the circumstances that occurred after that, ... I have really no choice and I must and hence I do grant a mistrial as to all three defendants.

[R37-450-174].

listed by the Government as new witnesses for retrial of the drug conspiracy charge. The District Court never considered the significance of these events, which the prosecutor claimed to be "fortuitous" [R9-451-15].

Even if the "clearly erroneous" standard was properly applied by the Court of Appeals, review of the record leaves "a definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). That mistake is found in the lower Courts' failure to objectively assess the entire record, which demonstrates a prosecutor's knowing introduction of false evidence to provoke a mistrial that he wants or needs. The Court should consider this type of deliberate impropriety as the next step in the development of double jeopardy jurisprudence.[16]

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[16]*See, e.g., United States v. Terry*, 5 F.3d 874, 877-78 (CA5 1993).

CONCLUSION

This Petition for Writ of Certiorari should be granted to enforce this Court's prior ruling in *Oregon v. Kennedy*. In view of the conflict of the decision below with that precedent, the Court may wish to consider summary reversal.

DATED this 6th day of March, 1996.

Respectfully submitted,

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APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED NOVEMBER 29, 1995

DO NOT PUBLISH

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

NOV 29 1995

MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-3352
Non-Argument Calendar

D. C. Docket No. 94-3-CR-J-16

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EARL JAMES FIELDS,
BEN ARTHUR TURNER, SR.,
BERNIE MAE KENDRICK FANN,

Appendix A

Defendants-Appellants.

Appeals from the United States District
Court for the Middle District of Florida

(November 29, 1995)

Before ANDERSON, COX, and CARNES, Circuit Judges.

PER CURIAM:

When the defendants were first tried they moved for a mistrial and the trial court declared a mistrial. The defendants then sought dismissal of the indictment, contending that the prosecutor intentionally provoked the defendants into seeking a mistrial.

The district court found that the prosecutor did not intentionally provoke the defendants into seeking a mistrial and, thus, that the defendants' retrial was not barred by the Double Jeopardy Clause of the Fifth Amendment. The issue on this appeal is whether that finding is clearly erroneous. We find no clear error.

AFFIRMED.

APPENDIX B - ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION FILED OCTOBER 28, 1994

94 OCT 28 AM 10:58

CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA,

v. Case No. 94-3(S3)-Cr-J-16

EARL JAMES FIELDS

Defendant.

ORDER

This cause is before the Court on Defendant Fields' Motion to Bar Retrial and Dismiss on Grounds of Double Jeopardy filed October 20, 1994 (Doc. #446). The government filed a response in opposition thereto on October 26, 1994. Upon due consideration of the motion and having reviewed the trial record, the Court finds that Defendant's motion should be denied.

Appendix B

The Defendant, Earl James Fields, and two co-defendants are indicted for conspiracy to distribute marihuana and cocaine as well as obstruction of justice. The trial of the Defendants commenced on September 19, 1994, and a mistrial was declared on September 23, 1994.[1] The Defendant asserts that the government prosecutor engaged in a pattern of prosecutorial overreaching that was intended to subvert the protection afforded by the Double Jeopardy Clause of the Fifth Amendment. Consequently, Defendant argues that this prosecutorial misconduct bars the retrial of the Defendant and mandates dismissal.

"The Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant from repeated prosecutions for the same offense." Oregon v. Kennedy, 102 S.Ct. 2083, 2087 (1982) (citation omitted); United States v. Zielie, 734 F.2d 1447, 1459 (11th Cir. 1984), cert. denied sub nom. Gustafson v. United States, 105 S.Ct. 957, and cert. denied sub nom. Govern v. United States, 105 S.Ct. 1192 (1985). Although this clause provides that no person shall "be subject for the same offense to twice put in jeopardy of life or limb," it is not an absolute bar to successive trials. United States v. Miller, 742 F.2d 1279, 1284 (11th Cir. 1984), cert. denied, 105 S.Ct. 1194 (1985). If a mistrial is declared over the objection of the defendant, the defendant may only be retried if "manifest necessity" mandated the mistrial because the defendant has a "valued

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[1] The trial was presided over by the Honorable James "The Just" M. Burns, visiting Senior United States District Judge, Oregon.

right to have his trial completed by a particular tribunal." Kennedy, 102 S.Ct. at 2087. See also Zielie, 734 F.2d at 1459.

If a mistrial is declared at the request of the defendant or with his consent, he is deemed to have waived any double jeopardy claim and it is no bar to retrial. Id. at 2088; Miller, 742 F.2d at 1284. In this situation, the defendant has elected to "forgo his valued right to have his guilt or innocence determined before the first trier of fact. Kennedy, 102 S.Ct. at 2089. There is, however, a narrowly delineated exception to the rule that the defendant's consent to a mistrial operates as a waiver of the Double Jeopardy Clause protection when the prosecutor engages in overreaching intentionally designed to "goad" the defendant into moving for a mistrial. Id.; Miller, 742 F.2d at 1284; Zielie, 734 F.2d at 1459. This exception requires the court to make a finding of fact as to whether the prosecutor possesses this intent from objective facts and circumstances.

Having reviewed the record, with particular attention to the Defendant's record citation, the Court cannot find that the federal prosecutor engaged in misconduct or overreaching that was intentionally designed to "goad" the Defendant into moving for a mistrial. The Defendant makes numerous references to an alleged "scorched earth prosecution" in which inadmissible evidence was admitted, the federal prosecutor "conducted war on his own witness," tongue lashed a federal public defender, and failed to correct an erroneous identification of the Defendant in a taped conversation. Although all of these colorful allegations are cited as demonstrative of the prosecutor's "recklessness in

the pursuit of convictions," the Court finds they are not germane to the precise issue before the Court.

Nevertheless, the Defendant asserts that the federal prosecutor continued his "heavy-handed strategy" and finally elicited a mistrial through the presentation of a hypothetical question to a key witness. The response to this hypothetical identified a method in which the Defendant could legitimize his alleged drug proceeds by purchasing winning lottery tickets. This hypothetical resulted in prejudicial testimony when a Co-Defendant's attorney elicited further testimony on cross examination that revealed the government could not produce a witness to verify the inference that the Defendant in fact engaged in the purported money laundering scheme. Accordingly, the Defendant moved for, and the Court granted, a mistrial.

The Court finds, however, that the record does not evince an intent by the prosecutor to deliberately cause a mistrial. The issue of winning lottery tickets and the gambling origin of the money was previously elicited during cross examination of the witness. On recross examination, the Defendant introduced into evidence a blown-up copy of a check from the Florida Lottery for $213,698.00 representing the proceedings of a winning ticket. Further, the Defendant elicited testimony from the witness that he had won a significant amount of money, close to a half million dollars, through the Florida Lottery. In response to this evidence, the government posed the hypothetical that ultimately generated prejudicial testimony warranting a mistrial. Nonetheless, the Court cannot find that this exchange was a deliberate attempt by the prosecutor to

induce a mistrial. Therefore, the Court finds that the Defendant elected to "forgo his valued right to have his guilt or innocence determined before the first trier of fact." Kennedy, 102 S.Ct. at 2089.

For the foregoing reasons, it is

ORDERED AND ADJUDGED:

That Defendant Fields' Motion to Bar Retrial and Dismiss on Grounds of Double Jeopardy filed October 20, 1994, (Doc. #446) is hereby DENIED. The Defendant's request for an evidentiary hearing and oral argument are DENIED AS MOOT.

DONE AND ORDERED in Chambers in Jacksonville, Florida, this 28 day of October 1994.

/s/ John H. Moore, II
CHIEF UNITED STATES DISTRICT JUDGE

Copies to:

All parties of record

APPENDIX C - ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION FILED NOVEMBER 4, 1994

94 OCT 28 AM 10:58

CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA,

v. Case No. 94-3(S3)-Cr-J-16

EARL JAMES FIELDS

Defendant.

ORDER

This cause is before the Court on Defendant Fields' Notice of Appeal from the Court's October 28, 1994, Order denying his motion to bar retrial and dismiss on ground of double jeopardy and Motion to Stay Trial Pending Appeal filed November 1, 1994 (Doc. #462). The denial of a double jeopardy claim is a final decision subject to interlocutory appeal under 18 U.S.C. §1291. Abney v.

United States, 97 S.Ct. 2034, 2042 (1977). However, the district court is not divested of jurisdiction and need not stay the retrial pending the interlocutory appeal if the district court makes written findings that the double jeopardy claim is frivolous. United States v. Farmer, 923 F.2d 1557, 1565 (11th Cir. 1991); United States v. Dunbar, 611 F.2d 985, 988 (5th Cir.), cert. denied, 100 S.Ct. 3022 (1980).

Upon due consideration of the motion and the premises therein, as well as the Court's October 28, 1994, Order denying Defendant's motion to bar retrial and dismiss on ground of double jeopardy, the Court finds the Defendant's motion should be granted and retrial stayed pending the interlocutory appeal. Although the court was not persuaded by Defendant's double jeopardy motion, it cannot find that it was frivolous. Accordingly, it is

ORDERED AND ADJUDGED:

That the Motion to Stay Trial Pending Appeal filed November 1, 1994, (Doc. #462) is hereby GRANTED and retrial is hereby STAYED pending the interlocutory appeal.

DONE AND ORDERED in Chambers in Jacksonville, Florida, this 4 day of November, 1994.

/s/ John H. Moore, II
CHIEF UNITED STATES DISTRICT JUDGE

Copies to:
All parties of record

APPENDIX D - ORDER ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED FEBRUARY 9, 1996

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

FEB 09 1995

MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-3352

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EARL JAMES FIELDS,
BEN ARTHUR TURNER, SR.,
BERNIE MAE KENDRICK FANN,

Defendants-Appellants.

Appendix D

On Appeal from the United States District Court for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion_____, 11th Cir., 19__, _____F.2d_____).

Before: ANDERSON, COX and CARNES, Circuit Judges.

PER CURIAM:

The Joint Petition for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5, the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Emmett R. Cox
UNITED STATES CIRCUIT JUDGE

APPENDIX E - PARTIAL TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION ON SEPTEMBER 23, 1994

* * *

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ZIPPERER - further redirect

FURTHER REDIRECT EXAMINATION

BY MR. MUELLER:

Q. Detective Zipperer, with respect to that check that is being passed around, can you describe why it might be of advantage, hypothetically, for a person, to both parties, for a person who had won such a check to sell it to another person and then let that person cash it? Why that could be an advantage hypothetically to both those people?

MR. TURNER: If your Honor please --

THE COURT: Overruled.

A. Yes. If you win a large sum of money like that, IRS is going to come visit and want to get a considerable portion of that. If you were in the drug business, it would be to your advantage to have won a considerable sum like that because then you have a legitimate source for having a large sum of money. So someone who is in the drug business and has large sums of money can pay the real winner the

winning amount, therefore the real winner doesn't have to pay the taxes and the drug dealer has a legitimate source of funds.

MR. MUELLER: That's all I have.

THE COURT: Thank you.

MR. TURNER: If your Honor please.

THE COURT: No, sir.

MR. TURNER: Your Honor, I - - the prejudice by that hypothetical - -

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ZIPPERER - further redirect

THE COURT: You can take that up later. We are finished at this juncture.

MR. TURNER: But, your Honor, Mr. Mueller knows that that is not what happened in this case and so does Mr. Zipperer.

THE COURT: Mr. Turner, I ask you, please, to - - Mr. Coxe?

MR. COXE: May I recross, your Honor?

THE COURT: Beg your pardon?

Appendix E

MR. COXE: May I recross, since I had not participated in that, with two questions?

THE COURT: Two questions? Three, Mr. Coxe.

MR. COXE: Thank you, your Honor.

FURTHER RECROSS-EXAMINATION

BY MR. COXE:

Q. Mr. Zipperer, do you remember in the recorded conversation between Archie Bevard and Mr. Turner and Ms. Fann, a discussion where Ms. Fann said, "I hear they be accusing him of trafficking in lottery tickets"?

A. Yes, sir.

Q. Will you tell me how - - and I understand Ms. Fann has nothing to do with this - - but how can a person know who is holding winning lottery tickets, to go get them?

A. Do you really want me to answer that question?

Q. I wouldn't have asked it.

A. Okay. Mr. Fields is very admired in the black community. He's looked up to. He's considered a Robin

Hood kind of guy.

Q. A What?

A. A Robin Hood sort of fellow. He passes out money freely. He goes to a particular place that sells lottery tickets and he's very well known there. The majority of the winning lottery tickets have come from this location. During the course of our investigation we've determined that he is not even in town when some of these tickets that he's cashed in as winners were cashed in. Therefore, I believe, as I've told the jury here already, that he is buying the winning lottery tickets from people to launder his funds and help the other - - the legitimate winner out by not having to report it to the IRS.

Q. And do you have someone to come before this jury and explain that is what is going on?

A. Myself, I just explained.

Q. No, I'm thinking about somebody who would come and say this is what happened?

A. Are you talking about a person like a Government agent or somebody or - -

Q. A seller of a ticket or a buyer of a ticket?

A. No, of course not.

MR. COXE: I have nothing further.